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No. 89-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES J. DOODY, et al.,
Petitioners,
vs.
SINALOA LAKE OWNERS ASSOCIATION, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Sinaloa Lake Owners Assn., et al. (the Property Owners), oppose the Petition filed by the policy-making officials of the California Department of Safety of Dams (DSOD policy-makers) and pray that the Petition be denied.

STATEMENT OF THE CASE

The facts on which the Court of Appeals for the Ninth Circuit based its ruling are set forth in that Court's opinion (App C to the Petition) and that statement is incorporated here.

A brief summary of the facts will suffice to describe the factual background and show that there is no need for this Court's intervention.

Fundamentally, this case is about the abuse of governmental power by the DSOD policy-makers.

The Property Owners, collectively, owned a private dam and lake. Individually, each owned a lakeshore home. Because of a question about the structure of the dam, the DSOD policy-makers ordered the Property Owners to investigate the dam's safety and reply to the DSOD policy-makers by March 15, 1983. (CR [Clerk's Record] 235A, p 10) At the time of this letter (February 10, 1983), the DSOD policy-makers acknowledged that they had made "no . . . modern engineering studies and evaluations . . . for key elements of this dam." (CR 222, p 9)

Notwithstanding that the DSOD policy-makers had told the Property Owners that they had until March 15 to report on the dam and actions (if any) needed to insure its safety, the DSOD policy-makers decided on March 4 to breach the dam. This decision was not communicated to the Property Owners. (CR 235A)

On March 9, one of the Property Owners heard a rumor that the DSOD policy-makers may have decided to breach the dam. (CR 282, p 33) In a telephone conversation with Petitioner Doody (Chief of the DSOD) on March 9, Petitioner Doody untruthfully said that no decision regarding breaching the dam would be made until March 11 (CR 282, p 33), even though the DSOD policy-makers had decided on March 4 to breach the dam (CR 235A).

On March 11, after 90% of the water had been drained from the lake, eliminating any emergency which the impounded water may have created, the DSOD

policy-makers told the Property Owners that they had decided to breach the dam. (CR 282, p 33)

At 4:00 p.m. on March 11 (a Friday afternoon), the Property Owners obtained an informal hearing before a State Superior Court judge to attempt to prevent the breach of the dam. However, because of the 8-day concealment of the decision by the DSOD policy-makers, the Property Owners were unable, in the short space of a few hours from notification to hearing, to obtain any expert testimony to support their request. The judge therefore took no action. (CR 235A, p 16)

At 5:00 p.m. on March 11, the DSOD's contractors began to breach the dam. (CR 235A)

It was this scenario which prompted the Court of Appeals to conclude:

> "We conclude that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes. This claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them." (Pet App C, p C-30; footnotes deleted.)

THE COURT OF APPEALS' OPINION WILL NOT "CHILL" LEGITIMATE GOVERNMENT ACTION

The argument by the DSOD policy-makers that the decision below will "chill" legitimate government action (Pet 16) or that all inverse condemnation plaintiffs will be able to allege facts to bring themselves within the rule of this case (Pet 12) would be ludicrous were it not from a State Attorney General. From that source, however, the argument itself is a chilling example of the kind of governmental conduct which led the Court of Appeals to its decision.

The arguments raised in the Petition need not detain this Court.

First. The holding that a procedural due process cause of action can arise from mistreatment of property owners by government agencies is in the mainstream of current judicial thought. In each of the following cases, for example, the court recognized the propriety of such a cause of action by a property owner:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1305;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 600;

Herrington v. County of Sonoma (9th Cir 1987)
857 F 2d 567;

Parks v. Watson (9th Cir 1983)
716 F 2d 646, 655-657;

Evers v. County of Custer (9th Cir 1984)
745 F 2d 1196, 1202;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.

Second. The "chilling effect" foretold by the DSOD policy-makers is a sham. As the facts of this case amply demonstrate, the opinion below was not based on ordinary governmental responses to emergency situations. Indeed, the opinion goes out of its way to note that it does *not* deal with ordinary governmental responses to emergencies:

> "To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power. *See Moore [v. City of East Cleveland]*, 431 U.S. at 520-21 (Stevens, J., concurring) (ordinance not shown to have substantial relation to public health, safety or morals, which cuts deeply into fundamental rights normally associated with ownership of residential property, violates substantive due process)." (Pet App C, p C-29)

Thus the opinion in this case speaks to the extraordinarily outrageous actions of the DSOD policy-makers, who proceeded in conscious disregard of the rights of the Property Owners and in a manner not justified by any emergency.[1] No government official reading the

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[1] The DSOD policy-makers' continuing reference to the "hearing" before a state trial judge before the dam was breached as though that "hearing" was meaningful in a due process sense (*e.g.*, Pet 17) is mystifying. As the Court of Appeals' decision makes clear, that "hearing" was a sham and a farce because the DSOD policy-makers lied to the Property Owners about their decision to breach the dam and concealed that decision until it was too late for the Property

(continued)

opinion in this case need be concerned about doing his duty. He need only be concerned about abusing his power.

THE COURT OF APPEAL'S DISCUSSION OF SUBSTANTIVE DUE PROCESS IS IN THE MAINSTREAM OF CURRENT JUDICIAL THOUGHT

In their effort to obtain total victory (rather than the partial affirmance granted by the Court of Appeals), the DSOD policy-makers assert that the Court of Appeals created some "vague new substantive due process theory . . . in property taking cases" (Pet 23), inconsistent with decisions of this Court and other Courts of Appeals.

Wrong.

Such an assertion can be made only by ignoring a substantial body of case law from this Court and other Courts of Appeals. For example, each of the following decisions notes the propriety of a cause of action under 42 USC §1983 for violation of a property owner's substantive due process rights:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1303;

(ftn. continued)
Owners to assemble the testimony needed to establish that breach was not necessary. (Pet App C, pp C-30-31, fn 15) It has long been settled that, to satisfy due process, a hearing must be held at a meaningful time and in a meaningful manner, so that the citizen has a fair opportunity to protect his rights. (*Mullane v. Central Hanover Bank & Trust Co.* [1950] 339 US 306; *Mennonite Board of Missions v. Adams* [1983] 462 US 791)

No government official should be "confus[ed]" (Pet 17) by an opinion which says that the government ought not lie and conceal.

Herrington v. County of Sonoma (9th Cir 1987)
857 F 2d 567;

Messick v. Leavins (11th Cir 1987)
811 F 2d 1439, 1442-1443;

Bello v. Walker (3d Cir 1988)
840 F 2d 1124, 1128-1129;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 603-608 [collecting numerous other citations];

Cunningham v. City of Overland (8th Cir 1986)
804 F 2d 1066, 1068;

Scott v. Greenville County (4th Cir 1983)
716 F 2d 1409, 1419;

Hammond v. County of Madera (9th Cir 1988)
859 F 2d 797;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.

In each of these cases except *Hammond* and *Messick*, the cause of action arose out of zoning or building permit disputes. In *Hammond*, the court held that governmental trespass stated a §1983 claim. In *Messick*, the court held that governmental destruction of private property stated a §1983 claim. Each case recognized the existence of a substantive due process cause of action. Because this Court has expressly noted that physical invasion cases (like *Hammond*, *Messick*, and the case at bench) are *more* likely to result in government liability than regulatory cases (like the other cited cases) (*e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 US 419, 426), the recognition of a cause of action for physical invasion is in harmony with established law.

Nor is there anything to the DSOD policy-makers' assertion that all inverse condemnation cases will be

transmogrified by clever pleading into substantive due process cases for the sole purpose of keeping them in federal court. (Pet 12) The tests applied to taking claims and substantive due process claims are not the same:

> "A substantive due process claim does not require proof that all use of the property has been denied [citation], but rather that the interference with property rights was irrational or arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 . . . (1976). Bateson was not required to seek 'just compensation' from state entities before bringing this substantive due process claim, and therefore this claim is ripe for adjudication. *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986)(because substantive due process is violated at the moment the harm occurs, the existence of post deprivation state remedies does not bar a §1983 action)." (*Bateson*, 857 F 2d at 1303)

Moreover, contrary to the DSOD policy-makers' claim, there is nothing strange or unique in a conclusion that, although a "taking" claim is not ripe, a substantive due process claim may be pursued. In each of the following cases, the court held that a taking claim was either not ripe or nonexistent, but nonetheless recognized the viability of a substantive due process claim:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1303;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 603-608;

Scott v. Greenville County (4th Cir 1983)
716 F 2d 1409, 1419;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.[2]

Lacking authority, the DSOD policy-makers concoct what they present as a *reductio ad absurdum* argument:

> "Since the Fifth Amendment itself contains a due process clause virtually identical to that of the Fourteenth Amendment, and the Fifth Amendment has not been interpreted to require pre-taking compensation [citation], it simply makes no sense to conclude, as the Ninth Circuit apparently has, that a taking of property without pre-taking process or notice is not an unconstitutional 'taking' if a state remedy is available, but that such a taking is nevertheless a substantive due process violation under the Fourteenth Amendment, irrespective of an available postdeprivation state remedy." (Pet 25, fn 12)

There are at least two things wrong with the DSOD policy-makers' proposition. *First*, the first half of their "equation" is wrong. The existence of a state remedy does not render the taking Constitutional, it merely renders federal litigation unripe. *Second*, the second half of their "equation" is wrong. It is not the "taking" which is "nevertheless" a violation of substantive due process, but the *pre*-taking actions (at bench, the DSOD policy-makers' lying about their actions and concealing their decision to breach the dam and thereby depriving the

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[2] *Herrington v. County of Sonoma* (9th Cir 1987) 857 F 2d 567 recognized a substantive due process cause of action even though the property owners abandoned their taking claim.

Property Owners of the opportunity for a meaningful predeprivation hearing). Thus, each half of the "equation" is legally incorrect. The two halves don't "equate" anyway.

Contrary to the argument in the Petition (Pet 23), the opinion below is consistent with this Court's decision in *Graham v. Connor* (1989) 490 US ___, 104 L Ed 2d 443. *Graham* was expressly addressed by the court below. (Pet App C, pp C-26-27, C-29) That analysis demonstrates that *Graham*, which requires analysis of police misconduct which violates the Fourth Amendment to be made under the Fourth Amendment, rather than under substantive due process, does not apply here. This is not, as the DSOD policy-makers would describe it, a simple Fifth Amendment taking case. As the Court of Appeals made clear, the prevarication and concealment engaged in by the DSOD policy-makers went *beyond* a Fifth Amendment taking case, and involved abuses of governmental power not controlled by specific protections in the Bill of Rights. (Pet App C, pp C-26-27, C-29)

Thus, the Court of Appeals' conclusion that the DSOD policy-makers' reprehensible conduct (aptly detailed in the opinion) stated a ripe cause of action for violation of substantive due process was grounded in precedent.

PARRATT HAS NEVER BEEN INTERPRETED AS BROADLY AS PRESENTED BY THE DSOD POLICY-MAKERS' PETITION

The most omnipresent charge in the Petition is that the Court of Appeals' opinion eviscerates this Court's decision in *Parratt v. Taylor* (1981) 451 US 527 as applied to real property cases in *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 US 172.

Wrong.

The DSOD policy-makers have an overblown fantasy about the expansiveness of the *Parratt* rule. No court has agreed with the DSOD policy-makers' analysis.

Numerous courts have held that *Parratt* does not apply to cases alleging violation of substantive due process:

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 607;

Augustine v. Doe (5th Cir 1984)
740 F 2d 322, 327, 329;

Mann v. City of Tucson (9th Cir 1986)
782 F 2d 790, 792;

Gaut v. Sunn (9th Cir 1986)
792 F 2d 874, 876;

Smith v. City of Fontana (9th Cir 1987)
818 F 2d 1411, 1414;

Williams-El v. Johnson (8th Cir 1988)
872 F 2d 224, 228;

Gilmere v. City of Atlanta (11th Cir 1985)
774 F 2d 1495, 1500 (en banc).

As summarized in *Smith*:

> "Actions which violate these specific substantive protections of the Bill of Rights lie outside the scope of *Parratt* because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. Hence, *Parratt* is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights . . ." (818 F 2d at 1415)

See also Williams-El, 872 F 2d at 228; *Gilmere*, 774 F 2d at 1500.

The Fifth Circuit — evidently tiring of being told by government defendants that *Parratt* compelled the dismissal of all §1983 actions — expressed the thought in this pithy manner:

> "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. *Parratt* applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional provision." (*Augustine*, 740 F 2d at 329)

Nor does *Parratt* apply to all procedural due process cases. Where the government *could* provide a remedy but fails to do so, and the injury is caused by deliberate action, *Parratt* does not apply:

> "The defendants argue that under the Supreme Court's decision in *Parratt* . . . , due process is satisfied when the state provides a post-deprivation remedy. They contend Evers has an adequate post-deprivation remedy in the form of a tort action or quiet title action. *Parratt*, however does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process. [Citation.]" (*Evers v. County of Custer* [9th Cir 1984] 745 F 2d 1196, 1202, fn 6)

The Eighth Circuit reached the same conclusion in *Littlefield*:

> "A plaintiff has a right to a predeprivation hearing unless the action is random and unauthorized or the state cannot possibly provide a predeprivation hearing or the circumstances are those which the Supreme Court has recognized as excusing a predeprivation hearing. *E.g.* . . . (seizure of contaminated food). If the plaintiff has a right to a predeprivation hearing, then the inquiry proceeds to what type of predeprivation hearing is required. . . . State post-deprivation remedies cannot satisfy due process if a predeprivation hearing is required." (785 F 2d at 600)

These Court of Appeals decisions were firmly grounded in this Court's decision in *Hudson v. Palmer* (1984) 468 US 517, 534, in which this Court explained the *Parratt* rule as follows:

> "There we held that postdeprivation procedures satisfy due process because the state cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. *The controlling inquiry is whether the state is in a position to provide for predeprivation process.*" (Emphasis added.)

Here, the DSOD policy-makers were "in a position to provide for predeprivation process" within the meaning of *Hudson*. They had instituted such a procedure on February 10, 1983. They then short-circuited their own procedure by their decision to breach the dam 8 days before the actual breach, 8 days before notifying the Property Owners of that decision, and 12 days before the time for the Property Owners' report on the dam's structure. Plainly, the DSOD policy-makers used those 8 days to employ their independent demolition contractor so he could transport his equipment to the dam. If the demolition contractor could be given notice, so could the Property Owners. (The DSOD policy-makers have never denied this advance notification of the demolition contractor. Nor could they.) *Some* advance hearing was possible. *Some* effort to comply with the due process guarantees of notice and hearing (not to mention honesty and fair dealing with citizens) was possible. Yet, the DSOD policy-makers attempted none. Instead, they ambushed the Property Owners.

The Petition errs by reading more into *Parratt* than any court ever has. This Court summarized the law developed by *Parratt* and its progeny last Term:

> "Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' Davidson v. Cannon, supra, at 348 . . . ; see also Daniels v. Williams, supra, at 331 . . . (' " 'to secure the individual from the arbitrary exercise of the powers of government,' " ' and 'to prevent governmental power from being "used for purposes of oppression" ') (internal citations omitted); Parratt v. Taylor, 451 US 527, 549 . . . (Powell, J., concurring in result) (to prevent the 'affirmative abuse of power'). Its purpose was to protect the people from the State . . ." (*DeShaney v. Winnebago County Dept. of Soc. Services* [1989] 489 US ___, 103 L Ed 2d 249, 259)

CONCLUSION

The decision of the Court of Appeals is correct both as a matter of law and as a matter of justice. It requires the DSOD policy-makers to account to a trier of fact for their mistreatment of the Property Owners.

To date, the DSOD policy-makers have never given any explanation for their deceit and concealment. They — and the State's legal officers on their behalf — have simply stonewalled and denied that the Property Owners should have had any reason to expect fair treatment. With any respect due, that is not justice.

The *facts* are the determinative aspect of this case. And the facts show shameful Constitutional violations.

The Property Owners pray that the Petition be denied so that a trial on the merits may be had.

Respectfully submitted,

FADEM, BERGER & NORTON

MICHAEL M. BERGER
Counsel of Record

Attorneys for Respondents
Sinaloa Lake Owners Assn.,
Inc., et al.,

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STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On October 19, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

JOEL A. DAVIS
Deputy Attorney General
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That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Respondents herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On October 19, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

Notary Public in and for
said County and State